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ABSTRACT

Most communication courses and research involving freedom of speech examine issues by reviewing the decisions of the United States Supreme Court and the federal appelate courts. However, the high visibility of the federal courts can lead to a misguided emphasis by students of the history of free speech. Research into the development of present legal protections should concentrate on early decisions of state courts. For example, a review of the development of Wisconsin's interpretation of its constitutional provisions on free speech shows that many hundreds of cases before 1925 dealt, at least tangentially, with some aspects of free speech or free press. The most important aspect of its decisions was the degree of protection it afforded for criticism of public figures. By 1925, the court had provided itself with a number of precedents which it could choose to consider dominant in any particular case and may have been determined by the balance the court thought wise between the free speech rights of the individual or newspaper and the right of a person not to be the object of public ridicule. In this balance, the court gave more leeway to criticism of public officials whose conduct as officials was before the voters. The court appeared unwilling to extend the fair comment rationale to persons who were not integral members of the governmental process. The Court was also not willing to extend the constitutional protections to censorship by nongovernmental sources. Very generally, there was an increase in the protection of expression during the period from 1858 through 1925. (HOD)

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THE DEVELOPMENT OF PROTECTION OF POLITICAL EXPRESSION IN WISCONSIN SUPREME COURT CASES: 1848-1925

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Most communication courses and research involving freedom of speech examined issues by reviewing the decisions of the U. S. Supreme Court and the Federal appellate courts. The high visibility of the federal courts can lead to a misguided emphasis by students of the history of free speech. Research into the development of present legal protections would be well advised to concentrate on early decisions of state courts for at least three reasons.

First, up until the United State Supreme Court's decision in Gitlow v. New York, the protections of the First Amendment to the Federal Constitution were not available to a party in a state court proceeding.[1] Since free speech issues are most commonly raised in the type of cases found in state courts, the state appellate decisions interpreting state constitutional provisions were the primary guides for free speech decisions for most of our nation's history. Therefore, a proper historical analysis of permitted speech needs to concentrate in state decisions. Yale Law School professor Thomas I. Emerson has noted that adequate studies of local free speech interpretations are lacking[2] and some scholars have begun attempts to correct that deficiency.[3] This paper makes that attempt using Wisconsin's treatment of political speech as its data.

An equally important reason for state free speech histories is that the state and federal guarantees, while similar, are not identical. Historically and textually, state constitutional provisions are not mere reflections of the First Amendment. Wisconsin's provision reads:

> Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right, and no laws shall be passed to restrain or

> abridge the liberty of speech or of the press. In all criminal prosecutions for libel, the truth may be given ...in evidence, and if it shall appear to the jury that the matter charged as libelous be true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.[4]

State appellate courts have recently emphasized the significant differences between rights protected under state constitutions and federal safeguards and may have granted greater state protections.[5] This recent emphasis by state courts on their own constitution has been closely followed by the legal profession.[6] This general trend recently received a setback in Wisconsin when the Wisconsin Supreme Court opined that the state constitution provides no greater press protection than the federal constitution;[7] but this view was inconsistent with other recent statements of that court.[8]

While historical mandates and textual differences may justify reliance upon the state constitutions, perhaps the most compelling reason for examination of state constitutions is that the body politic intended state guarantees to be independently evaluated. As one of the first justices to the Wisconsin Supreme Court noted:

> The people (of Wisconsin) made this constitution, and adopted it as their primary law. The people of other states made for themselves respectively, constitutions which are construed by their own appropriate functionaries. Let them construe theirs - let us construe, and stand by ours.

Since the recent decisions of the Wisconsin Supreme Court have focused largely on the holdings of early cases,[10] the study of this history may have a profound impact on current law. Nonetheless, no such study has yet been published.

Wisconsin's general history indicates that such a study would be warranted. Professor Robert C. Nesbit has pointed out"...a state

that offered two such contrasting generic terms to national politics as La Follettism and McCarthyism must command attention" and that "Wisconsin history offers an unusually good vantage point for a long view of much of our national history."[11]

A review of the development of Wisconsin's interpretation of its constitutional provisions on free speech shows that there are many hundreds of cases before 1925 that deal, at least tangentially, with some aspect of free speech or free press. The cases could be characterized as dealing with 1) Libel, 2) Espionage, 3) Criminal Syndicalism, 4) Disloyalty, 5) Symbolic Speech, 6) Obscenity, 7) Commercial Speech, 8) Gag Rules, 9) School Censorship, 10) Provocation to Anger, and 11) Disturbing the Peace. The development of the law in any of these areas seems worthy of study.

In order to narrow the scope of this paper, suppression of expression of political libels has been selected. The justification for this selection is found in the distinction argued by philosopher Alexander Meiklejohn. Meiklejohn argued that speech may be properly divided into political and non-political speech. Political speech must be protected, according to this view, because that speech is essential to self-government.[12] Michigan Law School Professor Thomas M. Cooley, the leading constitutional scholar of the mid to late 1800's made the same argument.[13]

Within the scope of this paper, thus limited, a framework of the law concerning freedom of speech as understood by writers of the times will be presented followed by an analysis of the Wisconsin cases.

Treatise Interpretation of Free Speech Protection

Wisconsin law has not developed in a vacuum. The law is written by legislators and interpreted by judges who are motivated, at least in part, by their conception of the importance of free expression.[14] Justice Oliver Wendell Holmes's statement described this truism of the judicial process in 1881:

> The life of the law is not logic, it has been experience. The felt necessities of the time, the prevalent moral and political theories, institutions of public policy, ...even the prejudices which judges share with their fellowmen, have a great deal more to do with the law than the syllogism.... In order to know what that is, we must know what it has been and what it tends to become. We must alternately consult history and existing theories of legislation.[15]

The particular process and the problems of writing the Wisconsin Constitution have been dealt with extensively in other places.[16] The non-Wisconsin reader need only know that the constitution was not adopted easily. The 1846 constitution of the First Wisconsin Constitutional Convention was decisively rejected by the voters. A revised document which compromised the politically controversial banking, Negro sufferage and women's rights issues was adopted in 1848.

This paper is concerned with the state free speech guarantee. This item, unlike most others, was adopted with little controversy. University of Wisconsin professor Ray Brown reported that "(f)reedom of the press and speech was guaranteed, and in prosecutions for libel the truth might be given in evidence and the jury empowered to decide both questions of law and fact."[17] The same language had recently been adopted in the revised New York State constitution and many of the Wisconsin constitutional delegates were from that state.

The Wisconsin free speech provision varies from the Federal Constitutional provision in several significant areas. Though cases after 1925 have stated that the protections of the Wisconsin and the federal constitutions are the same, at one point the Wisconsin Supreme Court indicated that the State provision "is somewhat more definite and sweeping than is contained in some of the constitutions. It declares that the freedom extends to 'all subjects' and expressly prohibits the restraint or abridgement of that freedom."[18]

The initial clause of the Wisconsin Constitution's free speech provision states that "every person may freely speak, write, and publish his sentiments on all subjects..." Professor Cooley, is his "Treatise on Constitutional Limitations," suggests that language protecting the First Amendment rights of free speech and freedom of the press be included in every state constitution. Cooley's treatise, even though published after the formation of the Wisconsin constitution, was used in several early cases as support for the Court's interpretation of the free speech principles and was also accepted as authoritative when published.[19]

Cooley's general position on freedom of speech was that it should be protected to aid the political process. In his textbook, "Principles of Constitutional Law" he considers freedom of speech and of the press together with the rights of suffrage rather than with the general civil rights of citizens such as religious liberty or the protections against unwarranted invasions of one's home or examination of personal papers.[20] He interpreted "free speech" as:

> . . . the liberty to utter and publish whatever the citizen may choose, and to be protected against legal censure and punishment in so doing, provided

> the publication is not so far injurious to public morals or to private reputation as to be condemned by the common-law standards, by which defamatory publications were judged when this freedom was thus made a constitutional right. And freedom of speech corresponds to this in the protection it gives to oral publications.[21]

Cooley's emphasis on the public purposes of the protections was made clear on his textbook on torts, where he opined:

> . . . freedom of the press was undoubtedly intended to be secured on public grounds, and the general purpose may be said to be to preclude those in authority from making use of the machinery of the law to prevent full discussion of political and other matters in which the public are concerned.[22]

As will be seen, Cooley's interpretation of the guarantee was not always followed by the Wisconsin Supreme Court.

The Wisconsin constitution provides that those persons who exercise their right to speak or publish, do so "being responsible for the abuse of that right." This clause makes it clear that the Wisconsin right is not absolute. The protection to speak without prior governmental censorship was, according to Blackstone, the heart of the common-law guarantee.[23] Of course, any government action restricting this right will be post-facto. Even in the Starr Chamber prosecutions, the offense was usually for publishing without a license and proof of publication was an element of the crime.[24] Cooley was aware of this history and suggested that as far as the federal protection was concerned, "it seems more than probable, . . ., that the constitutional freedom of the press was intended to mean something more than mere exemption from censorship in advance of publication."[25] Otherwise, "the citizen might better have the arm of government interposed for protection, than reached out afterwards to inflict penalties; his freedom would be restrained in the one case as well as the other."[26]

Since the constitutional provisions indicate themselves that the freedom to publish is not absolute, what did it mean to be responsible for the abuse of that right? Cooley suggests that the provisions in state constitutions were intended to continue the common-law right of an action for libel as a civil remedy and that those rules were "consistent with a just freedom, and they remain undisturbed."[27] As he explained in his treatise, Constitutional Limitations:

> It is conceded on all sides that the common-law rules that subjected the libeler to responsibility for the private injury, or the public scandal or disorder occasioned by his conduct are not abolished by the protection extended to the press in our constitution.[28]

For Cooley, therefore, the terms "freedom of speech" and "freedom of the press" were to be understood as they had been interpreted in the common law.

The provision in the Wisconsin Constitution that the state may not pass any law restraining speech or the press must be understood in this light. Soon after its first meeting, the Wisconsin legislature passed a law against slander and in World War I passed a stringent disloyalty statute. The slander statute was held not inconsistent with the constitution while the disloyalty statute was never tested. These interpretations were consistent with Cooley's belief that the free speech guarantees were not supposed to create new rights, but that they were designed to protect the citizen "in the enjoyment of those already possessed."[29]

Cooley's interpretation of the limits on legislation for the speech and press clauses were consistent with the summary of pre-World War I scholarship presented by Rabban in a recent Yale Law Journal article.[30]

The state constitution also provides that truth is always a defense in a libel action. Cooley explains that this and similar state provisions were meant to abolish the maxim "the greater the truth the greater the libel," and to insure that the protections found in "Mr. Fox's Libel Act", then already adopted in England, would be followed in Wisconsin.[31]

Wisconsin also protects those statements published "with good motives and for justifiable ends." This provision is akin to the present "public figure" doctrine. Cooley suggested in his treatise on Torts that:

> There should consequently be freedom in discussing, in good faith, the character, the habits, and mental and moral qualifications of any person presenting himself, or presented by his friends, as a candidate for public office, either to the electors or to a board or officer having powers of appointment. The same freedom of discussion should be allowed when the character and official conduct of one holding office is in question, and in all cases where the matter discussed is one of general public interest.[32]

This theory, apparently adopted by the framers of the Wisconsin constitution, if not by the judiciary who later interpreted it, was the minority rule until the 1964 New York Times v. Sullivan case which federalized the minority holding, 376 U.S. 245 (1964). Wisconsin did not adopt, without reservation, Cooley's suggestion until a post-Gitlow decision, Hoan v. Journal Co , 238 Wis. 311 (1941). Not all authorities of the period subscribed to this position, as can be seen by looking to another period text on torts by Chapin[33] and by consulting a popular legal encyclopedia of the day.[34]

The final provision of the Wisconsin constitution that allows the jury to be the judge of both the law and the fact is meant to

abolish a rule sometimes allowed in the common law which had the jury only find the fact of publication and the issue of identification. Mr. Cooley makes it clear that this provision was not part of the Common Law as it stood in 1848, but that this kind of language was inserted in order to insure that some of the perceived abuse of the common law courts were abolished.[35] As will be seen, this provision was not interpreted to abolish a judge's ability to rule that an article was libelous per se. Taken together, the Wisconsin protections enacted the current common law of 1848 regarding freedom of the press and speech.

Since the free speech and free press provisions were generally in conformity with the common law of 1848 it might have been assumed that enacting those provisions into the organic law would solidify the way the Wisconsin Court viewed free speech issues. This was not the case.

From the date of statehood until the Gitlow decision, the state Supreme Court had the opportunity to mention the free speech clause of the state constitution in hundreds of cases. Review of those decisions indicates a fairly consistent, yet not unchanging view of what the constitutional provisions meant. The remainder of this paper analyzes the major trends.

Criticism of Public Officials

In the period before Gitlow, the most common case dealing with political speech was an action by a public official or a candidate for a public office against a newspaper for libel during the election campaign. In this period, the Wisconsin Supreme Court attempted to establish areas in which the public interest to learn about candidates provided a constitutional privilege for a newspaper to make remarks

that would have been cause for libel actions if directed against a private individual.

Although a great number of cases emerged during this era, only the ones which illustrated the critical stages in the development of the law will be examined.

In the very early case of Van Slyke v. Carpenter, 8 Wis. 150 (1858), a Madison councilman sued the Wisconsin Patriot, a local newspaper. The councilman had voted against a city resolution which would have authorized increased borrowing by the city, a move the paper supported. In one passage, the paper noted: "If (he) were not a thief by nature, . . . he would resign." 8 Wis. 150, 153. The Supreme Court held this statement actionable.

The same newspaper was involved in Lansing v. Carpenter, 9 Wis. 493 (1859). The Patriot had charged that Judge Lansing intended to release anyone whom the legislature would jail for failure to answer questions in a pending legislative investigation of corruption. The paper feared that "one man, we beg pardon for calling such an ass a man, would be entitled to undo all that the legislature could do to expose the guilty." 9 Wis. 493, 494.

The article also implied the judge had been bribed. The Supreme Court held that:

> ...The publication complained of is clearly libelous... Such imputation against an officer (that he was bribed) has a natural tendency, so far as the influence of the press extends, to diminish the public confidence in his official integrity, and thus injure him in the business of his office. 9 Wis. 493, 494-5.

This rule appeared dangerous. Almost any criticism of a judge would have a 'natural tendency...to diminish public confidence in his official integrity...' Under this rule, a sitting judge would enjoy

substantial immunity from criticism. This justification would exempt judge from true as well as false criticisms--although the court might have ruled differently had the veracity of the charges been alleged.

The next significant case was heard in 1877. Cottrill v. Cramer, 43 Wis. 242, involved a series of speeches delivered by a candidate for mayor of Milwaukee. The Evening Wisconsin, a paper of general circulation in Milwaukee, published a series of articles highly critical of Mr. Cottrill. The paper charged Cottrill of making "the most fanatical and incendiary appeals to the Roman Catholic voters so that he smelled so badly that decent men avoided him when they passed him on the street." 43 Wis. 242, 243.

The paper argued that the article "merely criticized the introduction of a religious element into a political canvass." The Court rejected this argument, citing the Wisconsin Constitution as standing for the proposition that the jury should be both the law and fact finders, a position the Court was unwilling to take in earlier cases where the trial court found the matter libelous per se.

The Court came to a similar conclusion in a case heard two years later, Eviston v. Cramer, 47 Wis. 659 (1879). Eviston was the official sealer of weights and measures and inspector of scales in Milwaukee. The paper charged that Eviston "made a practice of tampering with such weights and scales for the purpose of increasing the fees of his office." The Supreme Court ruled that such statements were "prima facie prejudicial to (the) plaintiff, calculated to degrade him in public estimation and bring him into public hatred and contempt." 47 Wis. 659, 660.

The Court also emphasized the importance of the privilege to comment on public officials:

> Freedom of the press or exemption from censorship- the right to freely comment on the character and official conduct of men holding public office - is a most valuable right, and one without which popular governments cannot be maintained . . . (The purpose of the privilege of fair comment should) preclude those in authority from making use of the machinery of the law to prevent the full discussion of political and other matters in which the public are concerned. With this and other ends in view, not only must freedom of discussion be permitted, there must be exemption afterwards from liability for any publication made in good faith, and in the belief in its truth, the making of which, if true would be justified by the occasion. (citing Cooley) 47 Wis. 659, 660.

The Court therefore remanded the case to the trial court to determine if the paper had acted with improper motives, knowledge of the falsity of the charge, or express malice.

Express malice seemed evident in Buckstaff v. Viall, 84 Wis. 129 (1893). This case involved an insulting article published in the Oshkosh Times. Mr. Buckstaff was a state senator, who was afflicted with a disease which had caused a paralysis of the left side of his body and face, and substantially affected his appearance. Senator Buckstaff was against proposed changes in the Oshkosh city charter and he had considered a fillibuster to prevent the changes from passing the state senate. The ridicule in the Times was:

> . . . beautiful Senator Bucksniff; While it is within they might power to defeat the will of the people of Oshkosh, forget, O Mighty Being, the advice of thy friends, the little Republican ward gods, and look with thy mighty right eye alone . . . And, in conclusion, thy divine South Side dictator, we implore that thou reconsider thy determination to defeat the laws. 84 Wis. 129, 130-32.

The senator was ablt to see his way into court to start a libel action (though it seems he could also sue for poor poetry). The transformation from Buckstaff to Bucksniff, an allusion to the contemptible Pecksniff described by Dickens, was a further act of ridicule. The Court found

that "this publication greatly injured the plaintiff in his office as senator and in h's reputation and brought him into public ridicule and contempt." 84 Wis. 129, 135.

The paper had claimed the privilege of fair comment. The Court responded that "if this article were a fair or reasonable comment on the plaintiff's official conduct as state senator, or upon his neglect of his legislative duties, and that were all, it might be privileged." However, in holding the article actionable, the Court pointed out that the narrative did not focus on official conduct, but on the Senator's physical affliction.

Although the decision held the paper guilty of a libel, there did seem to be protection for political comment that was not available in the 1859 Lansing case. The Court would have allowed a 'fair or reasonable comment upon . . . official comment or conduct" which is more expansive than the rule that would hold actionable "imputations which have a natural tendency to diminish public confidence in his official integrity", the test used in Lansing. In this area, therefore, there seems to have been some movement toward more protection of political speech between 1858 and 1893.

This issue was again before the Court in a series of eight cases decided between 1913 and 1925. The first case is Arnold v. Ingram, 151 Wis. 438 (1913). Ingram published a newspaper in Eau Claire, Wisconsin. He reprinted a sermon in which a fundamentalist minister charged that the city council had been "bought" by the saloon interests. The sermon also charged that Arnold, the district attorney, was a pawn of the tavern interests and argued against his reelection. While this article might have been declared libelous under the "bad tendency test"

the Court in 1913 held that it would no longer support such a result:

> A publication in the nature of an appeal by one elector to another to overthrow a ruling political clique and all who adhere to it, which imputes to its candidates no crime and employs toward them no degrading or insulting epithets, but denounces them in extravagant language as unfit for office, unworthy of public confidence, and derelict in their duties, does not go beyond the bounds of fair comment and criticism, and is therefore privileged. 151 Wis. 438, 438.

However, the door to a successful cause of action in such cases was left open where the plaintiff could prove malice or improper motives. What qualified as this kind of malicious intent?

This question was before the court nine months later in Ingalls v. Morrissey, 154 Wis. 632 (1913). Wallace Ingalls was running for the House of Representatives in the First Congressional District. Morrissey, publisher of a newspaper in Elkhorn, opposed his candidacy.

Ingalls was charged with being a "disgrace to his profession as a lawyer, and proved guilty of juggling his accounts as administrator of estates. . .(Ingalls) fattened upon the estates of the dead and rob(bed) heirs."

The lower court saw this as a false charge of criminal conduct and ruled that Ingalls had been libeled per se. Morrissey argued on appeal that he had made a justifiable mistake because as a layman, he had misread a technicality in an estate case. The Supreme Court ruled that the publisher should have been allowed that defense, which would have been enough, if proven, to deny malice.

The Court was less receptive to an action when the person libeled was not a candidate for office, but merely involved in a public issue. In 1914, the Court decided a case involving a newspaper which charged a lawyer with being incompetent and dishonest, Williams v. Hicks

Publishing Co., 159 Wis. 90 (1914). Hicks was the publisher of the Northwestern, an Oshkosh paper. It had been the practice to undervalue commercial property in Oshkosh in order to attract and keep businesses. In 1913, the city fathers directed the assessor to assess property at full value. The S. Heymann department store received a large increase in assessed valuation. The owners of the store saw the change as unfair. Williams was hired to present their claims before the tax board. The alleged libel concerned the manner in which Williams handled the assignment.

The Northwestern charged that Williams was "entirely ignorant of the first principles of decent courtesy or fairness. . . (and that) he badgered and snubbed (witnesses) until the court had to intervene for the protection of the victim." The Supreme Court noted that the contest was "generally known and was of great public interest." Williams argued that his treatment in the paper was unjustified and libelous because it charged him with being disreputable. The Court noted that there was much testimony indicating that Williams was a respected member of the local bar.

The lower court had refused to instruct the jury that the charges in the paper were libelous per se, and that substantial damages should be awarded. This refusal was the subject of the appeal, since the plaintiff lost at trial. The Supreme Court reversed, holding:

> Mere good faith, honest belief, in the truth of the publication, good motives, accident, or inadvertence is not of itself a defense or sufficient to mitigate the actual damages recoverable.
>
> Conditional privilege as regards newspaper publications does not go beyond fair criticism in respect to the relations of persons to the public and report of facts. It does not extend to false statements of fact or unjust inferences, nor taunts, nor contemptuous and insulting phrases. 159 Wis. 90, 95.

The Supreme Court would have instructed the jury that the article was libelous per se and that a verdict of substantial damages should be forthcoming. The Court was less inclined to allow criticism of a person involved in a public dispute than a person running for political office.

The Court was also unwilling to grant a conditional privilege when the matter involved criticism of the city clerk in Milwaukee. In Leuch v. Berger, 161 Wis. 564 (1915), the Court allowed further libel actions against the Milwaukee Leader, edited by socialist congressman Victor Berger. The Leader thought overtime pay for salaried staff was "graft, pure and simple." The trial court had left it to the jury to decide if there was malice, but they were unable to form a consensus. The trial court then directed the jury to return the question in the negative and dismissed the complaint. Leuch appealed.

The Supreme Court found that "as a matter of fact, no graft charges had been made when the article was published." 161 Wis. 564, 572. On the question of the defense of fair comment, the court ruled, "It was proper for the newspaper to state the facts and to express the opinion that in its judgment the acts done were unlawful, but if the officer acted in good faith and simply made an honest mistake, it was allowable to brand him as a conspirator and a crook." 161 Wis. 564, 573.

The Court commented that while it had no disposition "to restrain legitimate freedom of the press, that freedom does not comprehend the publication of an untruthful statement about a private person or a public officer. . ."161 Wis. 564, 573.

The question of what is privileged political criticism was again before the court in the 1916 case of Putnam v. Browne 162 Wis. 196.

Giles H. Putnam was a 'Stalwart' Republican who was running for the office of County Judge in Waupaca County. Browne was the editor of the Waupaca Republican Post, and a La Follette supporter. Browne charged in an editorial that Putnam nad been bought off by the "Stalwart" big money interests in the 1910 gubernatorial contest. He charged that Putnam received $385.67 for his political influence and remarked:

> Do you think that selling one's influence for $385.67 is a good qualification for a high position like that of a county judge? In days gone by, the receiving of thirty pieces of silver forever and rightfully condemned a man. Times have not changed that receiving $385.67 for the purpose of defeating a man who was championing the people's cause ought to be a virtue or a qualification for office. 162 Wis. 196, 526.

The paper argued the conditional privilege for political comment in the trial court. The court agreed and the case was dismissed. The Supreme Court reversed and found that the comments were not privileged. A comment that it might have been unseemly to receive money for political influence might have been privileged, but the illusion to Judas was beyond the pale, since Judas committed the "greatest crime in the history of the Christian world" and that the comment was thus, not fair criticism of any type.

The Court also did not find privilege in a case where the charges were not as severe, but the publication had a wider audience. In 1918, the Court heard the case of Walters v. Sentinel Company 168 Wis. 196. Walters was the mayor of Stevens Point. He was ridiculed by the Milwaukee Sentinel in an editorial which characterized him as "Stevens Point's doctor-cowboy-lecturer-mayor." Walters had been elected as a reform candidate who said he would clean up the city even if he had to do it himself. The article generally classified Walters as a quack doctor

and a fanatic and at one point insinuated that he had assaulted the elderly city comptroller who disagreed with his reform moves.

The Milwaukee Sentinel argued in the lower court that it was protected by fair comment. The judge and jury did not accept this defense and the Sentinel appealed. The Wisconsin Supreme Court upheld the judgment. The opinion indicated that while the conduct of the mayor might be a public issue in Stevens Point, it was not so in Milwaukee.

There were still many things that could not be said about public officials in their hometown press as was evidenced by a case decided three years after. In the 1921 case of Hanson v. Temple, 175 Wis. 313, a libel action was sustained in which a local official was criticized. Frank Hanson was a state assemblyman from Juneau. Temple was the publisher of the Juneau County Chronicle. The paper charged that "Assemblyman Frank Hanson is acquiring some more cheap notoriety by sneering at prohibition enforcement in an outburst which asserts that to get drunk is human and keeping booze from a man is chaining him up. Jollying the liquor interests has become so a habit with him that he does not recognize its futility." 175 Wis. 313, 323.

At this time, the Eighteenth Amendment was in effect and the Volstead Act made the sale of liquor a crime. Wisconsin also had a state prohibition statute. The assemblyman brought a libel action charging the paper with accusing him of a crime because he had taken an oath as a lawyer to support the constitution. The paper raised the defense of comment. The Supreme Court denied the defense because the article could be read to state that Hanson was in violation of his oath of office.

The last case involving the question of fair comment on a public figure before the Gitlow decision occurred in 1925. On January 13, 1925, the court decided the case of Stevens v. Moorse, 185 Wis. 500. Stevens was a farmer, a student of advanced farming methods, and a farm organizer. Moorse was the editor, publisher, and owner of the River Falls Journal. Stevens spoke at a farmers' meeting and called for a farm strike to curtail overproduction that had lead to depressed farm prices,

The newspaper objected to his suggestion and said of Stevens:

> He is known as one of the poorest farmers anywhere. If everyone farmed as Pat Stevens does, there would be no need of talking about 'curtailing production' because there would be no production to curtail. His critics should know that Pat's very ignorance of the fundamentals and practice of his subject puts him in line for promotion as a wizard and prophet according to present-day standards in politics. 185 Wis. 500, 501.

Stevens alleged libel and the paper demurred. The paper argued that Stevens was "engaged in an occupation of a public nature in which the public has interest, and that the published article was therefore privileged and construed fair comment." The Supreme Court affirmed the trial court's judgment against the paper.

The Court ruled that false charges are not privileged. The privilege of fair comment does not "extend to false statements of fact or unjust inferences, nor taunts or contemptous or insulting phrases." The intent of the article was to "hold him up to the public as an object of ridicule and contempt." The Court ruled that "under such circumstances, the defense of conditional privilege cannot prevail." 185 Wis. 500, 502.

There were advances in the development of fair comments as a defense in political expression cases prior to Gitlow, but by 1925 it was not a sure-fire defense to a libel action. The Wisconsin Supreme Court was more willing to accept it as a defense when the alleged libel was published

in the home town paper. The Court was also willing to accept more criticism of a public candidate than a figure only tangentially in the public eye. Publishers would also have to be wary of implying that an official violated a law, for if they did, the defense of fair comment was seldom sufficient.

Reports of Public Proceedings

A related defense against a libel action would be for a paper to claim that it was just reporting what went on at a public proceeding. The theory is that the public has a right to know the activities of their governing bodies. Therefore, papers have a qualified right to make a true and fair report of a judicial, legislative, executive, or other public and official proceeding. The libel would not be actionable if the report is "fair". Fairness is measured in terms of accuracy, good faith, and the absence of malice.

A Wisconsin Supreme Court case revolved around the limits of this defense. The case involved Senator Buckstaff from Oshkosh whose paralysis was described earlier. In 1896, Senator Buckstaff was still holding out against changes in the Oshkosh city charter. George W. Pratt was a state assemblyman and in favor of changing the city charter. He appeared before the Oshkosh city council and reported the progress, and lack of it in the attempts to reform the city charter. The Oshkosh Northwestern reported that in that meeting the assemblyman said:

> It was a bad state of affairs when a man like Senator Buckstaff, who was four fifths of the time in a state of intoxication, would dictate to the city council what the Charter amendments should be. 94 Wis. 34.

Senator Buckstaff brought the action for libel. The paper argued that the article was privileged because the charges were made in the city council meeting. The paper demurred based on the privilege to report a legislative session.

The Supreme Court affirmed the dismissal of the demurrer. The Court explained that the privilege to report the proceedings of a legislative session had not been extended to a city council meeting, and therefore, the comments of Mr. Pratt carried no privilege when reported in the paper.

Contempt of Court

An important case dealing with criticism of public officials was State ex rel. Attorney General v. Circuit Court for Eau Claire County, 97 Wis. 1 (1897). In this case, the Wisconsin Supreme Court decided that a county judge could not punish a newspaper editor for speaking out against his reelection.

The defendant newspaper published an article charging the judge with corruption. When the judge first heard of the charge, he ordered the two attorneys before him on an unrelated case to hold the editor in contempt of court. The attorneys made the motion and the judge, not surprisingly, granted the motion. The judge personally delivered the order during his lunch hour, to show cause why the editor should not be jailed.

The defendants appeared and asked for a change of venue. The motion was denied. The defendants then asked for a delay so they could prepare a proper defense. The judge gave them until 7:30 that evening. At that time they filed an affidavit arguing the truth of the published

charges. They also asked for three days to prepare an additional motion. The judge denied the request and told them their case would be decided at 10 o'clock the next morning.

At 10 a.m. the defendants appeared and asked for further time. They were given until 7:30 the same evening. The defendants were not idle during this break. They traveled 170 miles to the state capitol and secured a writ from the Wisconsin Supreme Court declaring that the judge could not try the case himself because a contempt has to occur within the chambers itself.

Stymied by the defendants' speed, Judge Bailey suspended the charge presently against them, but since the defendants had entered an affidavit in court alleging the facts of the story as true, Bailey declared that this was a contempt of court within his chambers. This circumvented the writ of prohibition and Bailey summarily found the two guilty of contempt of court, committed them to jail for thirty days, and directed the sheriff to commence the sentence at once. The sheriff refused to execute the order.

The case was quickly appealed to the Supreme Court and was argued one week after the case was initiated. The court wasted no time in coming to a decision and within four days held that the contempt was in violation of the law.

The Supreme Court opinion noted that the case dealt with both the right of free speech and the respect necessary for the courts to operate:

> The importance of the questions arising in this case and the imperative necessity of a wise and just decision, can hardly be overestimated. These questions involve not only the right of the court to enforce due respect for its authority, and punish acts which tend to diminish such proper respect, and interfere with the performance of its important public duties, but they involve as well

> the preservation of liberty as against summary imprisonment, the right of free speech, the freedom of the press, and the proper limits which may be placed upon the discussion of the fitness of candidates for public office. 97 Wis. 1, 7.

The case presented a clear situation of an admitted libel of a public officeholder. There was no attempt by the defendants to argue that the material was not libelous per se. In reaching its decision, the Court admitted that there were precedents in other states in which criticisms of a sitting judge were held punishable contempt even though the words were not said within the courtroom. The Wisconsin Supreme Court rejected these precedents.

The Court argued strongly in favor of freedom of speech for opponents of a sitting judge up for reelection:

> Truly, it must be a grievous and weighty necessity which will justify so arbitrary a proceeding, whereby a candidate for office becomes the accuser, judge, jury, and may within a few hours, summarily punish his critic by imprisonment. The result of such a doctrine is that unfavorable criticism of a sitting judge's past official action can be at once stopped by the judge himself, or, if not stopped, can be punished by immediate imprisonment. If there can be any more effectual way to gag the press and subject freedom of speech, we do not know where to find it. Under such a rule the merits of a sitting judge may be rehearsed (sic), but as to his demerits, there must be profound silence. In our judgment, such divinity as this 'doth not hedge about' a judge; certainly not when he is a candidate for public office. 97 Wis. 1, 8.

Joining the Eau Claire case under the heading of contempt of court was the case of State ex rel. Schmidt v. Gehrz 178 Wis. 130 (1922). Gehrz was the circuit judge for Milwaukee County. Schmidt was a pamphleteer. While in the jury voir dier of a local power and light company, the lawyers asked the jurors if they were familiar with a circular published by Schmidt. The circular was in the "nature of an advertisement

of a forthcoming book constituting a sensational arrangement of the business practices and policies of the power and light company." 178 Wis. 130, 131.

The judge instructed the jury not to talk to anyone about the case and not to take into account anything that was included in the circular. After three days of the trial, the lawyers for the company presented evidence that the jurors had been called by Schmidt and told of the charges in the circulars. Judge Gehrz held Schmidt in contempt.

The Supreme Court affirmed on appeal. The Court ruled that:

> While a court should not hesitate to protect the administration of justice from improper influence, the right of free speech should be suppressed with great caution and only to the extent that is necessary to prevent an interference with the course of justice. 178 Wis. 130, 132.

This holding was based on the premise that the right of free speech must be protected, but so must the right of a fair trial. This issue still besets the courts today.

Conclusions

Protection of expression in Wisconsin law was independent of federal influence before 1925. Although the Wisconsin Supreme Court took notice of the decisions from other states, it relied heavily on its own previous decisions and its regard for the wisdom of the available options. The most important aspect of its decisions was the degree of protection it afforded for criticism of public figures.

By 1925, the Court had provided itself with a number of precedents which it could choose to consider dominant in any particular case and

may have been determined by the balance the Court thought wise between the free speech rights of the individual or newspaper and the right of a person not to be the object of public ridicule. In this balance, the Court gave more leeway to criticism of public officials whose conduct as an official were before the voters. Less leeway was given to critics of those holding ministerial positions. The Court also allowed more criticism that could be labeled opinion rather than a false charge of a factual nature.

The Court was more willing to accept a libel action by a judge than it was a contempt charge. This appears to have been true because of the protection given by intervening parties in a libel action (another judge or a jury) than in a contempt case. There was a greater degree of protection against supression in later cases than in earlier years, showing the development of the law. The reasoning of the court in the 1859 Lansing case was less libertarian than in the 1887 Eau Claire contempt case. This progression may indicate a greater appreciation for the right of free speech in the later decisions of the Court.

This progression might also be attributed to the generally more liberal stance taken by textwriters of the period. Cooley, for example, was quoted by the Court in several of its more libertarian decisions, and it may be inferred that the criticisms of rigid common law rules by other textwriters had taken their toll. As these texts became more accepted, they may have provided the theoretical impetus for a more progressive stand by the Wisconsin Supreme Court.

The Court also had to decide when a private citizen may lose some of his protection against defamation as he becomes involved in a public

dispute. The Court appeared unwilling to extend the fair comment rationale to persons who were not integral members of the governmental process. The Court was also not willing to extend the constitutional protections to censorship by non-governmental sources. Very generally, there was an increase in the protection of expression during the period from 1858 through 1925.

ENDNOTES

[1]Gitlow v. New York, 268 U.S. 652 (1925). This case marked a significant shift from the position denying federal protection in state cases first announced in the Slaughter-House Cases, 16 Wallace 36 (1873).

[2]Thomas I. Emerson, Toward a General Theory of the First Amendment; (Random House, New York, 1966), p. 22.

[3]David M. Rabban, "The First Amendment in its Forgotten Years," 90 Yale Law Journal 514 (1981): David Norris, "Freedom of the Press in Texas: A Comparative Study of State Legal Controls on Mass News Media," Ph.D. dissertation, University of Texas, 1954: Clyde Duniway, "Restrictions Upon the Freedom of the Press in Massachusetts," Ph.D. dissertation, Harvard University, 1954: Donald Grier, Jr., "Free Expression and the State Appellate Courts of Georgia and Florida: Constructive Contempt of Court, Written Obscenity and the Public Forum, Ph.D. dissertation, Florida State University, 1967.

[4]Wisconsin Constitution, Article 1, Section 3.

[5]State v. Ludlow Supermarkets Inc., 448 A.2d 791 (Vermont, 1982): State v. Badger, 450 A.2d 336 (Vermont, 1982): In re E.T.C., 449 A.2d 937 (Vermont, 1982): State v. Hernandez, 410 S.2d 1381 (La.1982): State v. Hunt, 31 Crim. L. Rptr. 1086, 2454 (N.J. 1982): State v. Caraher, Ore.S.Ct., decided Nov. 2, 1982 (Slip opinion): Ingerson v. State, 448 A.2d 879 (Maine, 1982): Alderwood Assoc. v. Wash. Envir. Council, 635 P.2d 108 (Wash. 1981): State v. Schmidt, 423 A.2d 615 (N.J. 1980).

[6]See 5 National Law Journal 24 (December 13, 1982).

[7]Denny v. Mertz, 106 Wis. 2d 636, 655-56 (1982).

[8]Compare Zelenka v. State, 83 Wis. 2d 601, 617 (1978) and Giwosky v. Journal Co., 71 Wis. 2d 1, 16 (1976) with Denny, supra.

[9]Attorney Gen. ex rel. Bashford V. Barstow, 4 Wis. 567 (1956).

[10]John Sundquist, "Construction of the Wisconsin Constitution-Recurrence To Fundamental Principles", 62 Marquette Law Review 531, 562 (1979): Junaid H. Chida, "Rediscovering the Wisconsin Constitution: Presentation of Constitutional Questions in State Courts", 1983 Wisconsin Law Review 483 (1983).

[11]Robert C. Nesbit, Wisconsin: A History, (Madison, Wisconsin, 1973), p. xiii.

[12]Alexander Mieklejohn, Political Freedom (New York: Oxford University Press, 1965), p. 3.

[13]Thomas M. Cooley, The Law of Torts, (Chicago, Calahan & Co., 1880), p. 217.

[14]Benjamin Cardozo, The Nature of the Judicial Process, (New Haven, Dartmouth College Press, 1921), p. 19.

[15]Oliver Wendell Holmes, The Common Law, (Boston, New England Press, 1881), p. 2.

[16]Ray A. Brown, "The Making of the Wisconsin Constitution", 1949 Wisconsin Law Review 693, and authorities cited therein.

[17]Ibid., p. 689.

[18]State v. Pierce, 163 Wis. 615, 619 (1916).

[19]Cooley, Constitutional Limitations, (Boston, Little Brown & Co., 2nd Ed., 1871), verbatim provisions of all state constitutions giving free speech guarantees then in effect are set out on pp. 414-146.

[20]Buckstaff v. Hicks, 94 Wis. 34 (1896); Eviston v. Cramer, 47 Wis. 659 (1879).

[21]Cooley, Principles of Constitutional Law, (Boston, Little Brown & Company, 1880), p. vii.

[22]Cooley, The Law of Torts, p. 216.

[23]Ibid., 274-275.

[24]Ibid., 214.

[25]Cooley, Principles of Constitutional Law, p. 273-274.

[26]Ibid., 273.

[27]Ibid., 275.

[28]Cooley, Constitutional Limitations, p. 420.

[29]Ibid., 417.

[30]Rabban, "The First Amendment . . .", pp. 559-579.

[31]Ibid., 538.

[32]Cooley, Law of Torts, p. 218.

[33]Gerald Chapin, Law of Torts, (St. Paul, West Publishing Co., 1916) p. 324.

[34]Hugh M. Spalding, Encyclopedia of Business Law and Forms, (Philadelphia P. W. Ziegler & Co., 1894), p. 637.

[35]Cooley, Constitutional Limitations, p. 459.